

IN THE MATTER OF LICENSE NO. 342627
MERCHANT MARINER'S DOCUMENT NO. Z-1071626
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Robert A. BAKER

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1687

Robert A. BAKER

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 21 December 1966, an Examiner of the United States Coast Guard at Long Beach, California, suspended Appellant's license for 12 months outright plus 6 months on 18 months' probation upon finding him guilty of misconduct. At the same time the Examiner suspended Appellant's Merchant Mariner Document for 12 months. The specifications found proved allege that while serving as first assistant engineer on board the United States SS HANS ISBRANDTSEN under authority of the document and license above described, on or about 20, 21, 22, and 23 November 1966 Appellant wrongfully failed to stand watches while the vessel was in a foreign port, and that on 22 November 1966 at a foreign port Appellant disobeyed an order of the Master, by going ashore.

At the hearing, Appellant failed to appear. The Examiner entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of two witnesses and certain voyage records of HANS ISBRANDTSEN.

Since the proceeding was held in absentia, no defense was offered.

At the end of the hearing, the Examiner rendered a decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of 12 months outright, plus an additional 6 months on 18 months' probation with respect to Appellant's license only.

The entire decision was served on 27 December 1966. Appeal was timely filed on 3 January 1967.

Appellant's notice of appeal contained also a petition to reopen, asking for a sixty day period after receipt of transcript for filing a brief. By 8 February 1967, Appellant had cast his petition to reopen in the form called for by 46 CFR 137.25-10, and again asked for a sixty day period in which

to file a brief after determination had been made as to his petition to reopen.

On 7 April 1967 Appellant was advised that since the petition to reopen and the appeal had been simultaneously filed they would be considered together. The requested sixty day period for filing a brief was granted to commence from the date of receipt of the 7 April letter. No brief has ever been filed.

FINDINGS OF FACT

On all dates in question, Appellant was serving as first assistant engineer on board the United States SS HANS ISBRANDTSEN and acting under authority of his license and documents while the ship was at Okinawa on 20, 21, 22, and 23 November 1966, Appellant wrongfully failed to stand assigned watches. On 22 November 1966, he had disobeyed a direct order of the Master not to go ashore, after the Master had taken his shore leave pass away from him.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. The Original notice of appeal states the following "grounds":

- "1. Jurisdiction was not properly established
2. The decision is contrary to law.
3. The order is excessive."

These grounds have not been made more specific despite the requested and extended opportunities to file briefs on appeal.

The petition to reopen simply states that Appellant did not understand advice given to him that a request for change of venue should be made to the Examiner and that he did not understand that the hearing would proceed in his absence at the date and time set if he did not appear. An affidavit in support of the petition recites matters intended as mitigation. Of the service of charges, the affidavit states: "It was my impression that he (the Investigating Officer) informed me that my presence would not be required and that the Hearing Examiner would transfer the case. I now realize that he must have said I had to be there to make the application."

APPEARANCE: Pressman & Scribner of New York City, by
Ned R. Phillips, Esquire of Counsel

OPINION

I

The "grounds for appeal" submitted here make no pretence to specificity.

While it is asserted that "Jurisdiction was not properly established," the fact is that the charges and specifications contain proper allegations of jurisdiction and the evidence of record adequately supports them. I there is some latent defect, I have not received it, and Appellant has certainly not invited my attention to it.

The naked assertion that "The decision is contrary to law" is not impressive. Contractual obligations imposed by law and a duty imposed to obey a shipmaster were alleged to have been violated and there is substantial evidence to support the allegations. If Appellant has in mind any other supervening law to which the Examiner's decision is contrary, he has not mentioned it.

An order may be "excessive" and its quality may be made the basis for appeal, but an appellant has some duty to indicate why it is excessive. It happens, incidentally, that the order will be discussed below, but not because of Appellant's allegation.

Since there has been no specification of fault or error, the appeal here is found to be entirely without merit.

II

To turn to the petition to reopen, it is seen immediately that it offers no newly discovered evidence. Everything recited in Appellant's affidavit occurred before the hearing was held and practically all of what he asserts to be the truth was singularly within his own knowledge and not known to anyone else. For this reason alone, the petition too is insufficient. However, it is not inappropriate to note that while Appellant (if the petition is to be considered as a clemency plea) declares that he was absent from the ship for the entire time during which he was frantically trying to obtain news of his ailing wife, there is evidence in the record both from the chief engineer, who saw Appellant ashore on one date and wondered whether he would stand his watch, and from the Master, who saw Appellant on board with a "hangover" on 22 November (right in the middle of the entire period in question) on which occasion he took Appellant's leave pass from him and ordered him to stay aboard, which contradicts his claim. Even if Appellant had testified to his distraught condition at hearing it is unlikely that the Examiner would have been impressed, especially in view of the fact when he was "logged" for his offenses, and had an opportunity to explain his domestic worries to the Master, he chose to make no reply. An officer with the problems urged by Appellant in his affidavit would almost certainly have discussed them with his Chief and the Master too even before he found himself "forced" to commit offenses. It is incredible that he would have offered no reply when given the opportunity to explain the offenses for which he was being logged. The post-hearing affidavit is not influential as an inducement to considering clemency.

III

If the petition to reopen were to have been considered seriously, it would have to be for the reason that it persuades one to believe that Appellant really thought that he did not have to appear for hearing to obtain a change of venue. The weakness of Appellant's affidavit as a credible statement

of facts under oath has been mentioned.

Against Appellant's claim of "misunderstanding" is the sworn testimony of the Investigating Officer given in open hearing that there had been discussion of change of venue at the time of service of charges, but that the Investigating Officer had emphasized that he had two witnesses at hand, the Master and the Chief Engineer of HANS ISBRANDTSEN, whose presence would be lost if the hearing did not begin at Long Beach, and that Appellant had recognized the complications of the situation. This is so inherently plausible that it would require more than an affidavit of the character of that offered by Appellant to raised a serious question of honest "misunderstanding".

The question of the order of the Examiner must be considered. Unmentioned in any of Appellant's appellate documents is the fact that at the time of the acts of misconduct proved in this case Appellant was already on a probation period of twelve months, ordered in August 1966. The suspension earlier ordered had been for six months. Thus, the Examiner in the instant case had invoked, as he necessarily had to, the six months earlier ordered. Since Appellant had successfully weathered only four months of his twelve months' probation, ordered after proof of serious misconduct while serving as a licensed engineer, before his violations here, the order in this case could be considered lenient rather than excessive.

v

The Examiner's order is still however subject to scrutiny. It is quoted in full:

"That your License No. 342627 and Merchant Mariner's Document Z-1071626 and all other valid licenses or documents issued to you by the Coast Guard or any predecessor authority, now held by you, are hereby suspended outright. This suspension is effective immediately on the service upon you of this order. This suspension shall remain in effect until twelve (12) months after the date on which you have surrendered your license and merchant mariner's document to the nearest Coast Guard office.

"Your license No. 342627 is further suspended for an additional six (6) months, which additional suspension shall not be effective provided no charge under R. S. 4450 as amended (46 USC 239) is proved against you for acts committed during the foregoing period of outright suspension or for acts committed within eighteen (18) months from the date of termination of the said foregoing outright suspension. If this probation is violated, the order for which probation was granted shall become effective with respect to all merchant mariner's documents, certificates and licenses here involved, and also any merchant mariner's document, certificate or license acquired by you during the period of probation at such time as designated by any Coast Guard Examiner finding the violation and may be added to or form a part of any additional order which is entered by such Examiner."

This order raises a most unusual problem.

It has long been recognized that when negligence or professional incompetence is involved an order may properly suspend a license and not a Merchant Mariner's Document, or a grade of license and not a lower grade of license. It has just as long been recognized that misconduct which is "generally" misconduct and not misconduct only because it is defined as such for, say, "a master, mate, pilot, or engineer," gives rise to an order affecting all documents issued to a seaman.

The theory behind this view is simple. If a common act of misconduct calls for suspension of a document, it calls as well for suspension of a license held by the person because such an act committed in future while serving under authority of the license would probably be a more serious offense. On the other hand, an act of common misconduct committed by a licensed officer, such as in this case, should call for suspension of the document as well as of the license because a person serving in an unlicensed capacity may be more easily tempted into committing such an act when not serving on his license.

The Examiner's order in this case was intended to treat Appellant's license more harshly than his Merchant Mariner's Document. While both are suspended for one year, there is an added suspension on probation attached to the license which does not appertain, on first sight, to the document.

If the Examiner had specified that the probation for the license suspension could be violated only by acts committed while Appellant was serving under authority of his license (and not in an unlicensed capacity) the distinction attempted by the Examiner might have been achieved even if it would not have been approved. But the order as framed very definitely provides that even though the license is on probation for eighteen months and the Merchant Mariner's Document is not on probation for that period, the wording of the order is not as to acts committed while Appellant might be serving under authority of his license but goes to any "charge under R. S. 4450 as amended (46 U. S. C. 239) is proved against you for act committed . . ." within the period of probation.

The distinction intended by the Examiner fails. If the Appellant should be found to have committed acts of misconduct under R. S. 4450 during the period of probation while serving in a licensed capacity all documents would be subject to the suspension order. In the same way, if Appellant should be found to have committed acts of misconduct under R. S. 4450 during the period of probation while serving in an unlicensed capacity, all documents, including the license, would be subject to the suspension order.

Thus, the Examiner's order here adds up to a suspension plus suspension or probation of all documents as if he had not attempted to make a distinction between his order as to the license and his order as to the document.

To avoid orders such as this attempt, the rule will be observed that an order for misconduct will apply equally to all documents held by the person charged and in the same terms. Obvious

exception to the general rule is again pointed out when the act becomes misconduct only when committed by a person holding a license by virtue of a statute or a traditional obligation imposed by the customs of the sea; when, as here, the acts found proved would be misconduct no matter who committed them, the general rule applies.

CONCLUSION

The petition to reopen the hearing must be denied.

The grounds submitted for changing the Examiner's findings are without merit.

The Examiner's order must be modified to make it equally applicable to Appellant's license and Merchant Mariner's Document.

ORDER

The petition to reopen is DENIED.

The findings of the Examiner entered at Long Beach, California, on 21 December 1966, are AFFIRMED.

The Order of the Examiner is MODIFIED so as to provide for a suspension of all seaman's licenses and documents issued to Appellant by the Coast Guard for one year, and, as MODIFIED, is AFFIRMED.

P. E. Trimble
Vice Admiral, United States Coast Guard
Acting Commandant

Signed at Washington, D.C., this 19th day of March 1968.

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